

³ The Board notes that following the issuance of OWCP's January 9, 2020 decision appellant submitted additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,828.40, for which she was without fault, because she concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period July 22, 2017 through October 12, 2019, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On August 26, 2016 appellant, then a 71-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 19, 2016 she injured the upper part of her right arm when she tripped while delivering a package in the performance of duty. She stopped work on August 29, 2016. Appellant's retirement system coverage was noted on the claim form as Federal Employees Retirement System (FERS).

OWCP accepted the claim for complete rotator cuff tear or rupture of right shoulder. It paid appellant wage-loss compensation on the supplemental rolls as of July 22, 2017 and on the periodic rolls as of July 22, 2018.

On August 15, 2019 OWCP forwarded a FERS/SSA dual benefits calculation worksheet to SSA to obtain information regarding whether an offset of compensation benefits was required.

On October 10, 2019 OWCP received from SSA an October 2, 2019 completed FERS/SSA dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since August 2015. The form showed appellant's SSA benefit rates with and without a FERS offset. Beginning August 2015, the SSA rate with FERS was \$2,026.40 and without FERS was \$644.90, beginning December 2015, the SSA rate with FERS was \$2,026.40 and without FERS was \$644.90, beginning January 2016, the SSA rate with FERS was \$2,099.00 and without FERS was \$644.90, beginning December 2016, the SSA rate with FERS was \$2,105.20 and without FERS was \$646.80, beginning January 2017, the SSA rate with FERS was \$2,165.10 and without FERS was \$646.80, beginning December 2017, the SSA rate with FERS was \$2,208.40 and without FERS was \$659.70, and beginning December 2018, the SSA rate with FERS was \$2,270.20 and without FERS was \$678.10.

OWCP completed a FERS offset calculation worksheet on October 24, 2019. It calculated the overpayment amount by determining the daily FERS offset amount and multiplying that amount by the number of days in each period July 22, 2017 through October 12, 2019, resulting in a total overpayment amount of \$41,828.40. The form indicated that from July 22 through November 30, 2017, appellant received an overpayment in the amount of \$6,607.11; from December 1, 2017 through November 30, 2018, she received an overpayment in the amount of \$18,635.46; and from December 1, 2018 through October 12, 2019, she received an overpayment in the amount of \$16,585.83.

In an October 24, 2019 letter, OWCP advised appellant that it had determined that she had been receiving FERS/SSA dual benefits. It related that the portion of SSA benefits earned as a federal employee as part of a FERS retirement package and receipt of FECA benefits concurrently was a prohibited dual benefit. OWCP informed appellant that it would begin deducting the portion of SSA age-related retirement benefits attributable to her federal service from her 28-day periodic compensation benefits and that her net FECA benefit every 28 days would be \$727.91 after the SSA offset.

On October 30, 2019 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$41,828.40 had been created because it had failed to reduce appellant's wage-loss compensation payments for the period July 22, 2017 through October 12, 2019, to offset her SSA age-related retirement benefits that were attributable to federal service. It explained that she began receiving regular SSA age-related retirement benefits on August 1, 2015 and the dual benefit began when she began receiving FECA benefits on July 22, 2017. OWCP also determined that appellant was without fault in the creation of the overpayment. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request a waiver of the overpayment. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, it provided her with an overpayment action request form and further notified her that within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On December 6, 2019 OWCP received appellant's overpayment action request form. Appellant requested a decision based upon the written evidence. She requested a waiver of recovery of the overpayment and argued that she was without fault.

Appellant also completed the Form OWCP-20 and reported total monthly income of \$2,441.81, however, she listed monthly FECA benefits of \$727.91 and monthly SSA benefits of \$1,813.90, which totaled \$2,541.81. She listed monthly expenses of \$2,661.35. Appellant listed current assets of \$0.00 in cash on hand, \$21,900.00 in checking, and \$2,500.00 in savings. She listed real estate assets including a \$60,000.00 plot of land, not in use. Appellant provided copies of financial documentation.

By decision dated January 9, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$41,828.40 for the period July 22, 2017 through October 12, 2019, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It found that she was without fault in the creation of the overpayment. OWCP denied waiver of recovery of the overpayment and explained that the circumstances of her case did not warrant a waiver. The decision found that appellant had monthly income of \$2,541.81 and that her total monthly expenses exceeded her total monthly income of by \$244.54. However, OWCP noted that she had not provided a detailed explanation of the other expenses listed, therefore, it was unclear if these expenses are related to ordinary and necessary expenses. With regard to appellant's resource base, it noted that she listed \$21,900.00 in checking, \$2,500.00 in savings, and land valued at \$60,000.00. OWCP found that her reported assets exceeded the

allowed resource base of \$6,200.00 for an individual. It required recovery of the overpayment by deducting \$150.00 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁶ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefits earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,828.40.

The evidence of record indicates that, while appellant was receiving wage-loss compensation benefits under FECA, she was also receiving SSA age-related retirement benefits based upon her federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period July 22, 2017 through October 12, 2019. Consequently, the fact of overpayment has been established.⁹

To determine the amount of the overpayment, the portion of SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rates with FERS and without FERS for specific periods from July 22, 2017 through October 12, 2019. OWCP provided its calculations for each relevant period

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see P.B.*, Docket No. 20-0862 (issued November 25, 2020); *S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ 20 C.F.R. § 10.421(d); *see S.M.*, *supra* note 6; *L.J.*, *supra* note 6.

⁹ *J.R.*, Docket No. 19-1418 (issued March 4, 2020); *L.M.*, Docket No. 19-1197 (issued January 8, 2020).

based on the SSA worksheet and determined that appellant received an overpayment in the amount of \$41,828.40. No contrary evidence was provided.

On appeal, counsel alleges that no overpayment exists as appellant received SSA benefits based upon her ex-husband's earnings. However, no evidence was submitted to the record prior to the January 9, 2020 decision to substantiate this allegation. OWCP properly relied on the information provided by SSA which indicated that appellant's SSA age-related retirement benefits were based on her own account, including earnings from her federal service.

The Board thus finds that appellant received prohibited dual benefits for the period July 22, 2017 through October 12, 2019, totaling \$41,828.40.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹¹

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹² An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³ Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.¹⁴ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁵ Non-liquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies,

¹⁰ *R.F.*, Docket No. 20-0159 (issued October 15, 2020); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

¹³ *Id.* at Chapter 6.400.4.a(3); *S.W.*, Docket No. 20-0363 (issued November 23, 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹⁴ *See id.* at Chapter 6.400.4.a(2) (September 2018).

¹⁵ *Id.* at Chapter 6.400.4.b(3).

vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.¹⁶

Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁷ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁸

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.²⁰

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²¹ Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base.

The Board finds that appellant, who reported \$21,900.00 in checking, \$2,500.00 in savings, as well as land assets valued at \$60,000.00 has not met the standard for waiver of recovery of the overpayment because her assets exceed the allowable resource base of \$6,200.00 in current assets. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet ordinary and necessary living expenses.²²

¹⁶ *Id.* at Chapter 6.400.4.b(3)(a), (b).

¹⁷ 20 C.F.R. § 10.437(a)(b).

¹⁸ *Id.* at § 10.437(b)(1).

¹⁹ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²⁰ *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

²¹ 20 C.F.R. § 10.436.

²² *M.H.*, Docket No. 19-1497 (issued September 9, 2020).

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.²³

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the \$41,828.40 overpayment.²⁴

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁵

Section 10.441(a) of OWCP's regulations²⁶ provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."²⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$150.00 every 28 days from appellant's continuing compensation payments.

OWCP gave due regard to the relevant factors noted above to minimize hardship and did not abuse its discretion in setting the rate of recovery.²⁸ The Board, therefore, finds that OWCP properly required recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation payments every 28 days.

²³ See *B.C.*, Docket No. 19-0629 (issued June 2, 2020); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁴ *B.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁵ 20 C.F.R. § 10.441; see *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

²⁶ *Id.* at § 10.441(a).

²⁷ *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²⁸ See *R.L.*, Docket No. 20-0186 (issued September 14, 2020); *L.M.*, *supra* note 9; *T.G.*, Docket No. 17-1989 (issued June 6, 2018).

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$41,828.40, for which she was without fault, because she concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period July 22, 2017 through October 12, 2019, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and that OWCP properly required recovery of the overpayment by deducting \$150.00 from her continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board